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AUG 8 1959
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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 287

PATRICK H. DEWITT, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the

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OCTOBER TERM, 1959

No. .....

PATRICK H. DEWITT, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Patrick H. DeWitt, Harry O. Rearick, Earl Stedham, Mike W. Young, Ivan Hess, Milton Trice, Clifford Holmes, Ernesto Arredondo, Bob Will, Paul Broyles, E. L. Hurt, Charles Swain, Paul Francis Barry, Ansel G. Brown, Jack Shaser, Raymond Petty, Bob Chesak, Bob Williams, Daniel Vandersall, J. T. Karriker, James Hales and Ernest Millard present this, their Petition for Certiorari to the

United States Court of Appeals for the Fifth Circuit, and to such end respectfully show:

A.

OPINION BELOW

The opinion of the Court of Appeals is reported in 265 Fed. 2d 393, and is found at Page 166 of the Record and attached hereto as an appendix. The District Court wrote no opinion.

B.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed is dated and was entered April 3, 1959. (R., p. 190.) Petition for Rehearing was filed on April 22, 1959 (R., p. 191), and was overruled on June 10, 1959 (R., p. 213). Judge Brown dissented.

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, 28 U. S. C. A., Section 1254(1).

C.

QUESTIONS PRESENTED

1. Presented here for the first time is the question as to whether culpable or wrongful intent is an essential element to a recovery by the United States of penalties and damages under the False Claims Act.[1] Or, as Judge Brown in his

[1] R. S. Sec. 3490 (1878), R. S. Sec. 5438 (1878), 31 U. S. C., Sec. 231.

dissent put it, "whether Congress intended that the heavy sanctions of the False Claims Act flow from the purposeful submission of facts which happen to be incorrect, or whether the actor must have been conscious that the asserted fact was wrong and nevertheless submitted it deliberately, knowing it to be incorrect and conscious that to do the latter was to claim a payment which the government did not owe were the true facts known."[2]

2. Presented, too, is the question of whether constructive notice of the correct interpretation of an ambiguous statute is the equivalent of actual knowledge, so as to make an act innocently done one that is done "knowing such claim to be false," subjecting the actor to the penalties of a penal statute. (False Claims Act)

3. The District Court refused the Government's Motion for Summary Judgment which is a non-appealable order. Yet the Court of Appeals held that it must reverse as to 29 causes of action and direct the District Court to enter judgment in favor of the Government, without affording the Petitioners the right to ask for relief from the stipulation or to a trial on the question of good faith. The question then is one involving the broad procedural problem of whether the Court of Appeals may circumvent the rule that orders denying summary judgments are not appealable in this manner.

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[2]Dissenting opinion p. A17 appendix. (R., p. 181.)

4. Whether the language of the Certificate of Loan Disbursement[3] is broad enough to amount to an assertion that the veteran intended to occupy the premises at the time of loan closing, so as to render Petitioners liable to the penalties and damages prescribed by the False Claims Act.

5. Whether under the basic Servicemen's Readjustment Act of 1944, as amended,[4] and pertinent regulations, the crucial time of the veteran's intent to occupy the property was the time of loan application or loan closing in view of the 1956 amendment?[5]

D.

STATUTES INVOLVED

The Statutes involved are False Claims Act, 38 U. S. C. 231, RS. Sec. 3490 and Sec. 5438, and Servicemen's Readjustment Act of 1944, as amended, 38 U. S. C. A. 694, 694a, 694d(a), (b) and (c), and the 1956 Amendment to the Servicemen's Readjustment Act, 70 Stat. 914, 38 U. S. C. 694d(d). Such statutes are lengthy, and are therefore set out in full in the appendix hereto.

E.

STATEMENT OF THE CASE

Respondent, United States of America, brought this suit under the False Claims Act against DeWitt and Rearick

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[3]The Certificate of Loan Disbursement reads: "1. The proceeds of the loan were expended for the purposes described in the * * * Application originally submitted and in the amounts shown in the statement of loan disbursements and costs hereinafter set forth: * * *.

"5. The loan conforms otherwise with the applicable provisions of the act and the regulations."

[4]38 U. S. C., Sec. 694, 694a and 694d.

[5]70 Stat. 914, 38 U. S. C. 694d(d).

and their salesmen, the other Petitioners, alleging that during 1948 to 1953 they had caused false statements to be made in Certificates of Loan Disbursement to the effect that the veteran intended to occupy the property to be financed with a VA guaranteed loan, for the purpose of inducing the Veterans Administration to guarantee the loan and pay a gratuity to the lender in the amount of $160.00, *well knowing* that such statements were false and that the Veterans Administration would rely thereon. (R., p. 92.) Petitioners stipulated with Respondent that photostat copies of certain documents, including the Certificates of Loan Disbursement, could be used on trial in lieu of the originals, and that in 29 cases a seller, represented by DeWitt and Rearick, contracted to sell property to a veteran who intended to occupy the property at the time the loan application was made; that prior to or at loan closing DeWitt and Rearick or one of the salesmen, were advised that the veteran had abandoned his intention of occupying; that thereupon DeWitt and Rearick agreed to purchase his house, and thereafter the veteran closed the loan and deeded the property to Harry O. Rearick for DeWitt & Rearick.[6]

Moving for Summary Judgment, Petitioners urged that (1) the crucial time for the veteran's intent to occupy the property under the basic Servicemen's Readjustment Act, as amended, was the time of loan application as distinguished from time of loan closing; (2) that Petitioners had no actual knowledge that the lender did sign or was re-

[6]The stipulation is partially set out in Note 9 of the Court's Opinion. Appendix p. A13, and fully set out at page 134 of the Record.

quired to sign and file with the Veterans Administration a Certificate of Loan Disbursement or any knowledge of the contents thereof (supported by affidavits of each Petitioner herein); (3) that the language of the Certificate of Loan Disbursement did not amount to a statement that the veteran intended to occupy as of the date of loan closing. (R., p. 75.)

Respondent, without any supporting affidavit, moved for Summary Judgment as to the 29 stipulated cases on the broad assertion that no genuine issue of fact existed as to said cases, and that Respondent was entitled to judgment as a matter of law. (R., pp. 130, 131.)

The District Court overruled Respondent's Motion and granted Petitioners' Motion. (R., p. 142.) The Court of Appeals reversed, holding that the Servicemen's Readjustment Act, as amended, even prior to the 1956 amendment, required the veteran's intention to occupy the property to exist at the time of loan closing, and that the uncontroverted affidavits of Petitioners that they had no actual knowledge with regard to the Certificate of Loan Disbursement constituted a mere conclusion, affording no basis for the Trial Court's finding that Petitioners had no knowledge with respect to such certificates, and hence could not have caused false statements to have been made. The Majority of the Court of Appeals held that the stipulation containing the mere conclusion that Petitioners, or some of them, had knowledge of the abandoned intent of the veteran, compelled them to reverse and direct the Dis-

trict Court to enter judgment against the Petitioners as to those cases; the apparent theory of the Majority was that Petitioners were charged with knowledge of the meaning of the Servicemen's Readjustment Act, as amended (even prior to the 1956 amendment), as it was interpreted by the Majority opinion herein, and this, coupled with the admission that they knew of the abandoned intent to occupy of the veteran, meant that Petitioners had *knowingly* caused false statements to have been made by the lender in the Certificates of Loan Disbursement. (R., p. 166.)

Judge Brown dissented: first, because he thought Petitioners should be afforded an opportunity to ask the District Court to relieve them of the harsh consequences of the Stipulation; and secondly, because he felt that the language of the False Claims Act was such as to indicate that the Congress did not intend to punish persons who acted innocently or mistakenly, but only those persons who acted consciously and deliberately, with knowledge that what they were doing would result in a false claim being presented, and that ~~that~~ the fiction of constructive knowledge was not in itself sufficient to show the necessary knowledge. (R., p. 181.)

The Majority opinion directed the District Court on remand to render judgment against Petitioners on 29 of the causes of action for penalties aggregating more than $67,000.00, and for further consistent proceedings as to the other 21 causes. (R., p. 180.)

F.

BASIS FOR JURISDICTION IN THE DISTRICT COURT

The basis of the jurisdiction in the District Court was RS 3491, as amended, 57 Stat. 608, 31 U. S. C. 232, and 28 U. S. C. 1345.

G.

REASONS FOR ALLOWANCE OF WRIT

1. The False Claims Act was passed for the purpose of protecting government funds from *fraudulent claims.* The Majority of the Court of Appeals extends that act to cover persons acting without fraud who unwittingly or mistakenly cause false claims to be presented against the Government. Moreover, the Majority holds that constructive notice of the correct interpretation of an ambiguous statute is the equivalent of actual notice so as to render the actors liable to the harsh penalties of the False Claims Act as a matter of law.

Neither the history nor the language of the False Claims Act justify this broad extension. The False Claims Act, passed to protect government funds from fraudulent claims,[7] presupposes a fraudulent intent and does not and never was intended to cover persons acting in utmost good faith without knowledge that a claim would be presented against the Government.[8]

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[7] *Rainwater v. United States, 356 U. S. 590, 78 S. Ct. 946, 2 L. Ed. 2d 996 (1958).*

[8] *Rainwater v. United States,* supra; *United States v. McNinch, 356 U. S. 595, 78 S. Ct. 950, 2 L. Ed. 2d 1001 (1958); Russell v. United States, 222 Fed. 2d 197 (5th Cir. 1955).*

The False Claims Act severely penalizes anyone who causes a claim to be presented against the Government or any of its agencies "knowing such claim to be false, fictitious or fraudulent."[9] There should be no difficulty in construing the word "knowing" to mean that the actor is aware of the fact that the claim is false, fictitious or fraudulent.

The cases which have dealt with the False Claims Act have characterized the intent essential to a violation as "an intent to deceive,"[10] "conscious that what the actor was doing was unlawful,"[11] "deceitful or fraudulent,"[12] "knowingly assisted in causing the government to pay claims which were grounded on fraud,"[13] and "intent to defraud."[14]

In cases involving the construction of statutes containing similar language and passed to protect the revenue of the United States, it has been uniformly held that evil or culpable intent is a prerequisite to punishment or penalty.[15] The term "knowing" as used in statutes prescribing penalties for knowing violations of Interstate Commerce Regula-

[9]Note 1, *Rainwater v. United States*, supra.

[10]*United States v. National Wholesalers, 236 Fed. 2d 944 (9th Cir. 1956), Certiorari denied, 353 U. S. 930, 77 S. Ct. 719, 1 L. Ed. 2d 724.*

[11]*Cocoran v. United States, 229 Fed. 2d 295 (5th, 1956).*

[12]*United States ex rel. Brensilber v. Basuch & Lomb Optical Co., 131 Fed. 2d 545 (2nd Cir., 1942), Affirmed in 320 U. S. 711, 64 S. Ct. 187, 88 L. Ed. 417.*

[13]*United States ex rel. Marcus v. Hess, 317 U. S. 537, 63 S. Ct. 379, 87 L. Ed. 443.*

[14]*United States v. Goldberg, 158 F. Supp. 544 (D. C. Pa. 1958).*

[15]*Felton v. United States, 96 U. S. 699, 24 L. Ed. 875 (187); Berkovitz v. United States, 213 Fed. 2d 468 (5th Cir., 1954); Bernstein v. United States, 234 Fed. 2d 475 (5th Cir., 1956); Hargrove v. United States, 67 Fed. 2d 820, 90 A. L. R. 1276 (5th Cir., 1933).*

tions has been construed to require a culpable intent.[16] Similar constructions have been placed upon statutes making it a crime to "knowingly" make false statements in naturalization proceeding,[17] and "knowingly" making a false entry in narcotic records,[18] and "knowingly" failing or neglecting to report for induction into the Armed Forces.[19]

In *Smith v. United States, 230 Fed. 2d 935 (6th Cir., 1956)*, the Court held that under a statute penalizing the making of any "statement knowing the same to be false," evil intent was an essential ingredient to conviction. In *Felton v. United States, 96 U. S. 699, 24 L. Ed. 875 (1878)*, this Court in construing a statute enacted to prevent fraud upon the revenue of the government held the use of the words "knowingly and wilfully" required a culpable intent before the penalty could be imposed. Aside from *Felton v. United States*, which involved a claim for a penalty, the rationale of *Morissette v. United States, 342 U. S. 246, 72 S. Ct. 240, 96 L. Ed. 288*, would seem to control this case. There the statute made it a crime for a person to "knowingly convert" government property. The defendant, while hunting on a government bombing range, took some spent bomb casings and sold them. This Court held that the use of the word "knowingly" in the statute compelled the conclusion that evil or culpable intent was an essential ingredi-

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[16] *Boyce Motor Lines v. United States, 342 U. S. 337, 72 S. Ct. 329, 96 L. Ed. 367 (1952); United States v. Chicago Express, 235 Fed. 2d 785 (7th Cir., 1956); Dearing v. United States, 167 Fed. 2d 310 (10th Cir., 1948).*

[17] *Zebouni v. United States, 226 Fed. 2d 826 (5th Cir., 1955).*

[18] *McBride v. United States, 225 Fed. 2d 249 (5th Cir., 1955).*

[19] *Graves v. United States, 252 Fed. 2d 878 (9th Cir. 1958); United States v. Hoffman, 137 Fed. 2d 416 (2nd Cir., 1943).*

ent of the crime and that, therefore, an unwitting taking was not within the statute.

The construction placed upon the False Claims Act by the Majority below conflicts with the above cited opinion of the Supreme Court as well as of other Circuits, and dispenses with the word *knowing* in the statute and makes it read as though that word was omitted. If it does not do that, then it extends by judicial legislation the fair meaning of the act by adding that if the actor "constructively knows," he is subject to the penalties of the act. Thus the act must be read as follows if their construction is correct:

"Every person who makes or causes to be made, or presents or causes to be presented * * * any claim upon or against the government * * * knowingly or *constructively knowing* such claim to be false, fictitious, or fraudulent" shall suffer the penalties of the Act. Since there are no judge made offenses against the United States, the meaning of a criminal statute may not be extended by implication.[20] It follows that no penalties may be imposed without statutory authorization and such statutes should not be extended beyond the fair meaning of the language used. Especially is that so when we are construing an admittedly criminal statute.

It is admitted that the statute in question was enacted to prevent frauds against the Government. Yet the court below held that there need be no fraud to entitle the Government to recover and that innocent or mistaken acts fall

[20] *United States v. Merriman, 263 U. S. 179, 44 S. Ct. 69, 68 L. Ed. 240, 29 A. L. R. 1547 (1923); Morissette v. United States, 342 U. S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952).*

within the terms of the statute. That the Government itself thought that culpable intent was an essential element of the action is shown by its allegations that the Petitioners caused the false and fraudulent statements to be presented for the purpose of inducing the Veterans Administration to pay the gratuity in the amount of $160.00, "*well knowing the statements to be false and well knowing that the Veterans Administration would rely thereon.*" (R., pp. 91, 92.) Thus, in order for Petitioners to be liable to the penalties of the act, they had to know (1) that a statement to the effect that the veteran intended to occupy at loan closing would be made, (2) that such statement was false, (3) that such statement would be presented to the Veterans Administration for the purpose of inducing it to pay the gratuity,[21] (4) that a gratuity would be paid if the loan was granted, and (5) that the Veterans Administration would rely thereon.

(Germane to Question 1)

2. This brings us to a consideration of whether these facts may all be presumed to have been known by the Petitioners as a matter of law because of the fiction that all persons are presumed to know the law. The Stipulation at the most is an admission that Petitioners knew that the veteran abandoned his intent to occupy at the time of loan closing. It is not an admission of any of the matters detailed in the preceding paragraph. So that the only possible basis for the action of the Majority below is the fiction of

[21] Reference to Loan guaranty is omitted because of the holding in *Rainwater v. United States.*

constructive notice. Under the holding of the Majority below, the citizen need not have actual knowledge that a claim is being presented or will be presented against the Government. If he does some act in the sense of knowing that he is doing a particular act, but without knowledge that the act will lead to a claim being asserted against the Government, and such act does lead to a false claim being asserted against the Government, he must pay the penalties prescribed. Nor may the fact that he acts in good faith in reliance on assurances from the Veterans Administration or advice of counsel that what he does is proper prevent his act from being a violation.

For example, if a dealer participated in the selling of a house to a veteran who bona fidely intended to occupy at the time of making the loan application and thereafter, between the time the loan application was made and the time the house was ready for occupancy, he abandoned his intent to occupy and he desired to sell the house which he had bought and the dealer agreed to buy it and was assured by officials of the Veterans Administration that to do so was proper and was advised by counsel that he could do so without violation of any law, the good faith of the dealer could not and would not be considered in determining whether he had caused a false claim to have been made "knowing such claim to be false, fictitious, or fraudulent." This holding is directly contrary to the holding of the 6th Circuit in *Smith v. United States, 230 Fed. 2d 935 (6th Cir., 1956)*, where the Court held that good faith of the defendant in relying on the lending bank official's assurance that what he was doing was permissible was a defense.

In any event, the question of the intent of the actor is a question of fact for the jury and should not be decided by the court as a presumption of law.[22] Brushing aside Petitioners' affirmative affidavits that they had no knowledge as to the Certificate of Loan Disbursement or its contents as mere conclusions, the court holds that the stipulation containing the sole admission that they knew of the abandoned intent of the veteran, which is conclusionary in its nature, together with the constructive knowledge with which they were charged, subjected them to the penalties of the Act without any opportunity to show on trial their (1) good faith, (2) that they acted on advice of counsel, (3) that officials of the Veterans Administration assured them that what they did was proper, (4) that they did not know a gratuity was payable and (5) that they did not in fact know that a Certificate of Loan Disbursement was made by the lender and presented to the Veterans Administration.

Constructive notice is in point of literal fact neither notice or knowledge.[23] Therefore it cannot, as a matter of law, supply the essential ingredient of intent required under the False Claims Act. The Court below goes too far and gives to the doctrine of constructive notice a broad scope which is not justified. Not only is a person charged with knowledge of the interpretation of an ambiguous statute but he is charged with knowledge of all forms used

[22] *Morissette v. United States, 342 U. S. 246, 72 S. Ct. 240, 96 L. Ed. 288.*

[23] *Schodel v. State Bank, 245 Wis. 74, 13 N. W. 2d 534, 152 A. L. R. 459 (1944).*

by the Veterans Administration, the procedures of the lenders and the procedure of the Veterans Administration officials in the processing of a loan. The doctrine of constructive notice ought not be so broadly extended nor should it be a substitute for that knowledge contemplated by the Congress when it purposely inserted the term "knowing" in the Statute.

(Germane to Question 2)

3. It is clear that an order overruling a Motion for Summary Judgment is not appealable.[24] While it is true that the order granting Petitioners' Motion for Summary Judgment is a final order and thus appealable, this does not make that part of the judgment denying Respondent's Motion for Summary Judgment as to 29 Causes of Action appealable. *John Hancock Mutual Life Ins. Co. v. Kraft, 200 Fed. 2d 952 (2d Cir., 1953).* In *Drittel v. Friedman, 154 Fed. 2d 653, (2d Cir., 1946),* the Second Circuit held that while that part of the judgment with respect to an injunction was appealable, that part of the judgment which denied Defendant's Motion for Summary Judgment was not reviewable. *Yorkshire Indemnity Co. v. Roosth & Genecov Production Company, 252 Fed. 2d 650 (5th Cir., 1958)* is not authority for the proposition that the Court of Appeals may circumvent the rule with reference to non-appealable judgments by the mere expedient of advising the District Court that it must on remand enter judgment for the Gov-

[24] *Florian v. United States, 114 Fed. 2d 990 (7th Cir., 1940), reversed in United States v. Florian, 312 U. S. 656, 61 S. Ct. 713, 85 L. Ed. 1105 (1941); Jones v. St. Paul Fire & Marine Insurance Company, 108 Fed. 2d 123 (5th, 1939).*

ernment. That case simply holds that in the absence of a Motion for Directed Verdict by the defendant in the District Court, the Court of Appeals may not render but must remand to the District Court.

(Germane to Question 3)

4. The language of the Certificate of Loan Disbursement (footnote 3) contains no language which remotely suggests that the veteran intended to occupy the house at the time of loan closing. The only possible way that the language can be so construed is to imply that the lender making the certification, as well as the officials of the Veterans Administration, knew prior to the 1956 amendment that the law required the intent to exist at that time, and since the lender is presumed to know the law (even though it is not clear or settled at the time the certificate is made) it, as a matter of fact, made a certification that the veteran intended to occupy at loan closing. Even this legalistic approach is not sound because, as a matter of fact, the lender is not making any such statement in the language quoted in footnote 3. Even if we concede that the law is that the intent must exist as of the date of loan closing, the language used does not say and does not purport to say that the veteran intended to occupy as of the date of loan closing. Prior to the 1956 amendment the veteran himself was not required by the law to certify to anything. Under the procedures set up by the Veterans Administration, the lender was required to make the certification set forth, but there was nothing in the law itself which required any such certification. Nor was there anything in the regulations

requiring any certification of intent as of loan closing date. Surely, Petitioners are not charged with notice of the procedures and forms prescribed by the Veterans Administration in the processing of a loan. Even if we go so far as to admit that they are so charged, there still is nothing in the language of the certificate that states that the veteran intended to occupy on the date the loan was closed. How, then, can Petitioners have caused the lender to have made a false, fictitious or fraudulent statement?

(Germane to Question 4)

5. Prior to the 1956 amendment, Congress had so legislated that the crucial time of the veteran's intent to occupy as a home was the time when he made his loan application. Under the basic Servicemen's Readjustment Act, as amended (footnote 4) the Veterans Administration was authorized to guarantee loans secured by veterans who desired to purchase homes. Under the procedures set up by the Veterans Administration, the veteran was required to make application for a loan guaranty in which he stated that he intended to occupy the home. The contract which he made with the Seller provided that it was subject to the approval of the lender and the Veterans Administration. In these cases (all of which arose prior to 1954) the veteran bona fidely intended to occupy at the time of the loan application but abandoned that intent prior to loan closing. The contract had been approved by the lender and the Veterans Administration (such approval being in the form of a Certificate of Loan Commitment, the existence of which, or the contents of which Petitioners had no actual knowl-

edge). Thus the veteran was faced with the alternative of losing the Earnest Money which he had advanced on his contract or proceeding to sell the equity which he had in the house by virtue of his contract. If he chose to sell his equity, that would not render the purchasers liable to the penalties of the False Claims Act because the veteran was doing nothing more than selling his equity. The fact that he closed the loan and then deeded the property to DeWitt and Rearick constituted no assertion of a claim against anyone. No then existing regulation of the Veterans Administration forbade the transaction. Under the law as it then existed, the intent to occupy need not exist at the time of loan closing. This is shown by the fact that the Congress itself felt the law was so uncertain as to require an amendment, adding a new subsection requiring the veteran (as distinguished from the lender) to certify both at time of loan application and loan closing that he intended to occupy the premises himself.[25] Presumably Congress intended thereby to make some change in the law.[26]

(Germane to Question 5)

The foregoing reasons for allowance of the Writ of Certiorari plainly show that important questions are involved which have been erroneously decided below, and decided in such manner as to constitute a complete departure from the applicable decisions of the Supreme Court and of other United States Court of Appeals. The lower court's judicial amendment of the False Claims Act affects the adminis-

[25]70 Stat. 914, 38 U. S. C. 694d(d).

[26]*United States v. McClure, 305 U. S. 472, 59 S. Ct. 325, 83 L. Ed. 296.*

tration of justice throughout the entire Fifth Circuit, if not the Nation.

CONCLUSION

WHEREFORE, the Petitioners pray the Supreme Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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By W C Peticolas

CERTIFICATION

W. C. PETICOLAS, one of Counsel preparing the foregoing Petition for Writ of Certiorari, hereby certifies that the same is made in good faith; that in his opinion there are good grounds for same, and that such petition is not filed for delay.

W. C. PETICOLAS further certifies that two copies of this Petition for Writ of Certiorari have been mailed with first class postage prepaid addressed to Samuel D. Slade and Maurice S. Meyer, United States Department of Justice, Washington, D. C. and to Messrs. Scott, Hulse, Marshall & Feuille, 1100 First National Building, El Paso, Texas, and that two copies of this Petition for Writ of Certiorari have been mailed with first class postage prepaid addressed to the Solicitor General, Department of Justice, Washington 25, D. C.

W. C. PETICOLAS

APPENDIX I

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17101

UNITED STATES OF AMERICA,

Appellant,

versus

PATRICK H. DEWITT, *et al.*,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

(April 3, 1959.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

BROWN, Circuit Judge: Presented here are questions whether a real estate dealer is liable to the Government for the civil penalties and damages under the False Claims Act or damages for common law fraud, and whether a mortgage lender is liable for equitable restitution because the Veterans Administration guaranteed a purchase money loan to a veteran who did not then intend to occupy the

property as his home. The District Court granted summary judgment in favor of the dealer-salesman as well as for the lender. The Government appeals.

The Complaint, filed August 14, 1956, covers fifty separate sales of real estate made to veterans in El Paso, Texas, by DeWitt and Rearick (Dealer) or their salesmen. Mortgage Investment Company (Lender) was the party who loaned the money in many, but not all, of these transactions. As to twenty-nine specified transactions, the parties made a stipulation. The Court, however, in granting summary judgment against the Government lumped these and the other twenty-one transactions together as though the facts were identical.

Subsequent to the judgment below an event occurred which considerably alters this litigation, and certainly the nature and reach of the civil penalties under the False Claims Act. In May 1958 the Supreme Court decided *United States v. McNinch*, 356 U. S. , 2 L. Ed. 2d 1001, and *Rainwater v. United States*, 356 U. S. , 2 L. Ed. 2d 996. Up to that time the government was contending, as they had in a somewhat similar situation before us in *United States v. Cochran*, 5 Cir., 1956, 235 F. 2d 131, cert. denied, 353 U. S. 491, 77 Sup. Ct. 262, 1 L. Ed. 2d 237, approved in note 10 of *McNinch*, that when the Dealer falsely represented to the Lender that the veteran intended to occupy the property as his home a false claim as to the whole transaction was made against the Government since it was thereby induced to guarantee payment of the loan. *McNinch*, of course, held that under

the False Claims Act,[1] extension of the Government's credit was not the making of payment of a claim.

In terms of dollars involved, the Government's complaint under the False Claims Act nearly collapsed. But there was yet enough of a relatively small item to make it into a case of substantial proportions. For under the basic veterans legislation a so-called gratuity, generally in the sum of $160, was payable out of public funds to the Lender to be applied by it on the veteran's loan. 38 USCA §694(c). This was the making and payment of a claim, *Rainwater v. United States*, *supra*, and if other conditions are satisfied this sets in train the imposition of a $2,000 penalty for each separate transaction.

In addition to this the Government seeks against the Dealer (and salesmen) the (1) difference between the Veterans Administration valuation and the higher price obtained in the Dealer's sale to a third party, (2) the can-

[1]The False Claims Act is nominally found at 31 USCA 231, see also §§232-235. But this gives a completely misleading impression. In the codification this is a blend of Revised Statutes §§3490 and 5438, the criminal portions of which are now found in 18 USCA §§287 and 1001. This is set out in note 1 of Rainwater v. United States, 1958, 356 U.S. , , 2 L. Ed. 2d 996, 998, as follows:

"1. RS § 3490 (1878): 'Any person * * * who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty eight [RS §5438 (1878)] * * * shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act * * *.'

"RS § 5438 (1878): 'Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval to or by any person or officer in the civil, military, or naval services of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent * * * shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars.'"

cellation of all Certificates of Guaranty if not in the hands of bona fide third parties, and as to all Certificates of Guaranty not thus cancelled, that (3) the Government be indemnified for any money which the Veterans Administration ultimately is required to pay by reason of the loan guaranties. Number (1) affirms the sale to the third party and seeks a part of the fruits of it, and this seems completely inconsistent with (2) and (3). Each, however, rest on notions of common law fraud, *United States v. Borin*, 5 Cir., 1954, 209 F. 2d 145, with no aid from the False Claims Act.

While the Lender was included in these broad prayers, it is now conceded that no fraud as such was charged or made out as to it. Money relief against it is restricted, therefore, to restitution of the gratuity payments received. Other relief is restricted to a cancellation of Certificates of Guaranty on mortgages not assigned to bona fide third parties. It is uncontradicted that no mortgages remain unassigned, so the suit as to Lender relates to the restitution of the gratuities only.

Discussion of the main problem is much simplified by considering it in terms of a transaction typical of those of the twenty-nine covered by the stipulation. The Dealer, as real estate agent for a seller, made a contract to sell a home to a veteran. The contract provided that it was subject to approval by the Veterans Administration. The veteran then made application for a Home Loan Guaranty. This application stated that he intended to occupy the house as his home. The VA issued a Commitment to the Lender

that it would thereafter issue a Certificate of Guaranty. Up to this point neither the sale nor loan was closed and the record is silent on the veteran's interim intention. But after issuance of the Commitment and either before or at the formal loan closing, the veteran abandoned his intention of occupying the house. Knowing this, but before actual closing of the loan, the Dealer agreed with the veteran to buy the house for a specified price. The loan was thereupon closed, the deed delivered to the veteran, and the Lender advanced the funds to the account of the Seller on behalf of the Purchaser, the veteran, under the loan made to him. Simultaneously, but unknown to Lender, the veteran deeded the house to Dealer who thereafter sold it at a profit to a third party having no veteran's eligibility.

The result was that such sale was financed almost altogether (substantially 100% of the VA's appraised value) by the Federally guaranteed veteran's loan though neither the Dealer nor the subsequent third Party Purchaser were eligible in that transaction for the benefits accorded by Congress on behalf of a grateful Nation.

As to the Dealer two problems emerge from this. First, was this a violation of the basic Servicemen's Readjustment Act of 1944, 38 USCA §§694, 694a, 694d, and pertinent regulations? Second, if it was, did the Dealer's activities in relation to the sale, the veteran and the Lender constitute the making or causing to be made of a claim "* * * knowing such claim to be false, fictitious, or fraudulent * * *" under the False Claims Act? On the first, the Government contends that the statute requires that the veteran, both at the

time of loan application and at the time of loan closing, must intend to occupy the house. The Dealer, on the other hand, asserts that until the 1956 amendments[2] the bona fide intention[3] relates only to the time of the loan application.

The dealer makes two principal arguments in its behalf. First, Congress, if it did not mean to change the law, i.e., add to it something which formerly was missing, at least thought the matter unclear enough to require a clarifying amendment.[4] The Dealer's next step is to say that if Con-

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[2]The Amendment added the following new subsection to §694d:

"(d) No loan for the purchase or construction of residential property shall be financed through the assistance of the provisions of this title unless the veteran applicant, at the time that he applies for the loan, and also at the time that the loan is closed, certifies * * * that he intends to occupy the property as his home. No loan for the repair * * * of residential property shall be financed through * * * this title unless the veteran * * *, at the time that he applies * * *, and also at the time that the loan is closed, certifies * * * that he occupies the property as his home. For the purpose of this title the requirement that the veteran recipient of a guaranteed or direct home loan must occupy or intend to occupy the property as his home shall be construed to mean that the veteran, as of the date of his certification actually lives in the property personally as his residence or actually intends upon completion of the loan and acquisition of the dwelling unit to move into the property personally within a reasonable time and to utilize such property as his residence." 38 USCA §694d(d), 70 Stat. 914.

[3]On this record this is not the case of trading in veterans' rights where the veteran never had any real intention of acquiring the house such as we have dealt with in McClanahan v. United States, 5 Cir., 1956, 230 F. 2d 919, cert. denied, 352 U. S. 824, 77 Sup. Ct. 33, 1 L. Ed. 2d 47; Russell v. United States, 5 Cir., 1955, 222 F. 2d 197; and Corcoran v. United States, 5 Cir., 1956, 229 F. 2d 295.

[4]As is customary both parties work over the legislative history to glean a few grains of help. H. R. Rep. No. 1971, 84th Cong., 2nd Sess. 2, 5, 6 (1956); U. S. Code Cong. & Ad. News 4085 (1956); Analysis of 1956 Amendments, Veterans' Administration Loan Guaranty Program, P. L. 898. House Committee on Veterans' Affairs (Aug. 3, 1956); S. Rep. No. 2489, 84th Cong., 2nd Sess. 4 (1956).

We have assiduously declined to read or consider Hearings Before the Subcommittee on Housing of the House Committee on Veterans' Affairs, 84th Cong., 1st Sess. (1955), pt. 200, 84th Cong., 2nd Sess. (1956), as to which considerable reference is made in the various briefs as this relates to hearings in which evidence on the merits of this case was given, but which is not properly in the record here or below as facts upon which summary judgment was granted or denied.

gress was uncertain about what it had legislated, then the citizen (Dealer) was entitled to the same luxury. Second, under the mechanical system[5] for processing veterans' loans reflected by the statute and implemented by regulations, the veteran was to sign only the original loan application. Consequently, the Dealer asserts, Congress hardly could have meant that the veteran was making two representa-

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[5]This process goes through six steps:

Step One. The veteran made a contract to buy a house. In a typical contract under "Terms of Sale" it provided "No * * * dollars cash * * * on delivery of deed. $8350.00 to be financed on G.I.—20 year loan. This sale is subject to approval by the Veterans' Administration and the lending agency. * * *."

Step Two. The veterans signed VA form for Application for Home Loan Guaranty or Insurance. This was also signed by the Lender. This form transmitted veteran's eligibility papers, copy of Certificate of Reasonable Value (appraisal), credit report and the sales contract. Under "Purpose, Amount, and Terms of Proposed Loan—give narrative description of purpose of loan" it was stated "to purchase a home."

Step Three. The VA then issued to Lender a Certificate of Commitment stating that "the Application * * * has been examined and the loan determined to be eligible for guaranty" but then provides that: "Upon receipt of this Certificate of Commitment and of a duly executed 'Certification of Loan Disbursement' showing full compliance with the applicable regulations, the Administrator will issue: A certificate of Guaranty for 60 percent of the Loan Amount Reported * * *."

Step Four. The Lender, after disbursing the amount of the approval loan, signed and filed with the VA its Certification of Loan Disbursement which states:

"THIS IS TO CERTIFY THAT:

"(1) The proceeds of the loan were expended for the purposes described in the * * * Application originally submitted and in the amounts shown in the statement of loan disbursements and costs hereinafter set forth.

"(2) There has been no change in the identity of the property or security described in the * * * Application except as follows: [none] * * *.

"(5) The loan conforms otherwise with the applicable provisions of the Act and the regulations."

Step Five. Thereafter the VA delivered to the Lender its Loan Guaranty Certificate which states:

"This is to certify that pursuant to the Servicemen's Readjustment Act of 1944 * * * and the regulations effective thereunder on the date of this certificate, 60 percent of the indebtedness outstanding from time to time under the loan identified above is guaranteed."

Step Six. Usually within about sixty days the VA sent to Lender a check for the amount of the 4% gratuity, usually $160, which, in accordance with a prior written direction signed by the veteran, Lender applied on the loan or, in a few cases, for the payment of insurance.

tions as to two different intentions—one expressed in the paper, the other implied in accepting the loan funds.

On careful consideration of these arguments we think they are without decisive merit. The law might have been more clearly worded. But when the obvious purpose of this legislation to supply badly needed homes in large numbers to the millions of service people returning to civilian life is taken into account, the Act seems plain enough. The statute provided that the United States would guarantee 60% of the purchase money loans upon houses purchased in accordance with the terms and provisions of the program. Not less than three times did the Act define loans eligible for guaranty in terms of those made to a veteran to be "used for purchasing residential property or constructing a dwelling *to be occupied as his home* * * *."[6] (emphasis supplied.)

The statutory mandate was that the loans be for the purchase, construction or improvement of a dwelling to be occupied by the veteran as his home. The guaranty was for the *making* of the loan, not the agreement *to* make it. Issuance of the Certificate of Commitment *(Step Three,* note 5, *supra)* was, of course, an important thing. But it did no

[6]Section 694a(a) provided:

"Any loan made to a veteran under this subchapter, the proceeds of which are to be used for purchasing residential property or constructing a dwelling to be occupied as his home or for the purpose of making repairs, alterations, or improvements in property owned by him and occupied as his home, is automatically guaranteed if made pursuant to the provisions of this subchapter * * *." 38 USCA §694a(a).

Subsection 694a(b) provides for non-automatic loans, i.e., prior approval loan guaranties where the veteran's dwelling is to be "occupied as his home." Sections 694a(d), (e) and (f) authorize automatic and prior approval loans generally.

more, and consistent with the law could do no more, than assure the holder that if the loan represented in the Application is made in accordance with the Act and regulations, as the Certificate of Disbursement expressly recites the facts to have been, then the Government will guarantee the loan.

The Act therefore required that at the very time the loan was closed the veteran intended to occupy the house as his home. In the twenty-nine stipulated cases this was not so. In the remaining cases the Government was entitled to show by stipulation, or by evidence on motion for summary judgment, or trial, that this was not so.

What is the significance of this against the Dealer under the False Claims Act? On this we are, of course, concerned only with the transactions in which the 4% gratuity was paid. Where none was paid, there was no "claim." *McNinch v. United States, supra.*

The Dealer obtained summary judgment presumably on the basis reflected in the District Court's so-called Findings

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[7]This is spelled out in the Regulations.

"(d) A certificate of commitment shall entitle the holder to the issuance of the evidence of guaranty * * * upon the ultimate actual payment of the full proceeds of the loan for the purpose described in the original report and upon the submission within 30 days thereafter of a supplemental report showing that fact and: * * *,

"(4) That the loan conforms otherwise with the applicable provisions of the act and the regulations concerning guaranty or insurance of loans to veterans.

"(f) * * * No certificate of commitment shall be issued and no loan shall be guaranteed or insured unless the lender, the veteran, and the loan are shown to be eligible; * * *.

"(g) Subject to compliance with the regulations concerning guaranty * * * of loans to veterans, the certificate of guaranty, * * * will be issuable within the available entitlement of the veteran on the basis of the loan stated in the final loan report or certification of loan disbursement. * * *." 38 C. F. R. §36.4303 (1956).

of Fact. Of course, in a summary judgment proceeding under FRCP 56 they cannot serve as such since there has been no trial. At best they are statements of those things which are established as uncontradicted as a matter of law or, in terms of the rule, as to which there is "no genuine issue," or reasons why the Court so concludes. These "findings of fact" were that the veteran intended in good faith to occupy the house as his home when he signed the application for the loan; that "at the time these loans were being made [the Dealer and Salesman] did not know that a Certificate of Loan Disbursement was required to be made, and, therefore, could not have knowingly caused a false statement of any nature to have been made in such certificate"; that the Dealers "thought that after the veteran had in good faith made application for VA guaranty and the Certificate of Commitment was issued, the veteran could sell, rent or do what he pleased with his home;" and that "much confusion, uncertainty and conflicts in the law and regulations arose covering transactions * * *" of this kind. The so-called conclusions of law determined that the "crucial time for intent to purchase a home for occupancy was at the time the veteran made application for a home loan * * *"; and "* * * the veteran could sell or do as he pleased with his home after approval of the application and issuance of the commitment * * * and before the loan was closed"; and "in view of the uncertainty and reasonable doubt about the law in effect at the time these loans were made, it would not be equitable or just at this late date to impose * * * the heavy penalties and damages prayed for" by the Government.

We find nothing in the record to support any of these statements. The sole proof to show the nonexistence of genuine controversy was the affidavit of each of the Dealers and individual salesmen affirming that none of them had actual knowledge prior to December 1953 that the Lender was required to sign a Certificate of Loan Disbursement or that the Lender was required to certify anything in connection with the loan.

Whatever our differences, later discussed, on the grant of the Government's counter motion for summary judgment, we are in full agreement that granting one for the Dealer and Salesmen was too hasty action. Putting to one side the complete absence in twenty-one transactions of the facts stipulated as to the twenty-nine, the whole thing for all fifty cases depends on the sufficiency of the affidavit, note 8, *supra*, which undertakes to state on oath that none

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[8]The verified motion for summary judgment stated:

"These Defendants state that up until December of 1953 they had no actual knowledge that the lender was required to sign a Certificate of Loan Disbursement at the time of the closing of the loan. In fact, these Defendants * * * had no knowledge that there was any such instrument as a Certificate of Loan Disbursement and had no knowledge that the lender was required to certify anything in connection with the loan. * * * these Defendants, having no knowledge that such a certificate was required or made, could not under any circumstances conspire or cause to be made a certificate of which they had no knowledge. * * * Since [none of] the Defendants, * * * had any actual knowledge that such certificate was required to be made or was actually made, they could not have caused such false certificate to have been made.

"3. * * * In each instance, the contract of sale between the seller and the veteran was made subject to approval of the loan by the Veterans Administration, and when such approval was made, and in each instance the approval was made, by the Veterans Administration, these Defendants understood that the veteran had purchased the house and that thereafter the veteran could sell such house and that such veteran did not have to intend to occupy the house at the time of the loan closing. That the Defendants acted in good faith in disposing of the properties or purchasing the properties under these circumstances. * * *."

of the Dealer-Salesmen had "actual knowledge" that a Certificate of Loan Disbursement had to be signed and filed by the Lender.

The Dealer urges, of course, that if these facts were deficient it was up to the Government properly to controvert them by evidentiary details. But as is too often the case, this is again a misreading of the principles so often announced by us on summary judgment. It is risky business to file no controversion. But it is not fatal to a trial on the issues involved if the moving papers show on their face that the matter is of a nature presenting a dispute, *Inglett & Co. v. Everglades Fertilizer Co.*, 5 Cir., 1958, 255 F. 2d 342, 348, or there is substantial doubt on it, *Heyward v. Public Housing Administration*, 5 Cir., 1956, 238 F. 689, 696; *Bruce Construction Corp. v. United States*, for use of Westinghouse Electric Supply Co., 5 Cir., 1957, 242 F. 2d 873.

The affidavit here falls in that category. To deny that one had "actual knowledge" is really a conclusion. Stated in this way—and undoubtedly so out of a desire fairly to represent the matter without misleading or dishonest exaggeration—it suggested that if they "knew" it was by the process of constructive or legal imputation. That would, or might, depend on what subsidiary details were known. Yet none of these was stated. Moreover, in the context of this total record, which included the stipulation, the specimen papers in the six steps of the transaction, note 5, *supra*, the Court had to recognize that there was a serious question of

what these extensive real estate Dealers and Salesmen knew about the Veterans Housing program.

What is the consequence of this conclusion? We are, first, unanimous that summary judgment for the Dealer and Salesmen under the False Claims Act was erroneous, and that this action as to both the 29 and 21 claims must be reversed. Second, as to the remaining 21 claims, there must be a trial. Our differences arise solely as to the further disposition of the 29 claims. While failure to grant summary judgment is not an appealable order as such, 3 Barron, Holtzoff & Wright, Federal Practice and Procedure §1242 (1958); 6 Moore, Federal Practice #56.21[2] (2d ed. 1952), Judges TUTTLE and JONES are of the opinion that the terms of the stipulation[9] are so emphatic that under the principles we have announced, there can be no genuine issue of fact as to the 29 claims so that on remand the District Court must grant the Government's motion. See *Yorkshire Indemnity Co. of N. Y. v. Roosth & Genecov Production Co.*, 5 Cir., 1958, 252 F. 2d 650, 657-58. This summary judgment will be for double the $160 gratuity and the statutory penalty as to each of the 29 transactions. The Court is of this opinion because the statute, as inter-

[9] "In each Cause of Action hereafter enumerated the seller, represented by DeWitt and Rearick, contracted to sell a house for a price set forth in the contract and such contract contained a provision that the sale was subject to approval by the Veterans Administration and the lending agency. The veteran made application for Home Loan Guaranty, stating in the application that he intended to occupy the house. After the Veterans Administration issued its commitment to guarantee the loan and *prior to, immediately before, or at loan closing the veteran informed Patrick H. DeWitt, Harry O. Rearick or one of their salesmen that due to his change of circumstances he had abandoned his original intention of occupying the house. Thereupon DeWitt and Rearick agreed with the veteran to purchase his house for a sum of money.* In each instance the veteran closed the loan and simultaneously deeded the house to Harry O. Rearick for DeWitt and Rearick." (emphasis supplied)

preted by us, and knowledge of which is, of course, imputed to these persons, requires that the veteran have the required intention concerning the use of the property as a home at the time of the loan closing. Since it was stipulated that he did not, the simultaneous closing of the transaction and the loan by the Dealer, knowing that a nonveteran was to acquire the property, meant that the Dealer was making a false representation. This constituted a false claim because the statute, note 1, *supra*, covers a person "who makes or causes to be made, or presents or causes to be presented * * * any claim * * * knowing such claim to be false, fictitious or fraudulent." Judge BROWN, on the other hand, for the reasons subsequently detailed by him, is of the view that the 29 claims should be remanded for a trial.

This brings us to the Lender. We are of the opinion that summary judgment in Lender's favor was correct and should be affirmed. As it is admitted that Lender did nothing but make the loans on what it thought was a valid transaction and had no knowledge, actual or constructive, that the veteran no longer intended to occupy the house as his home, the Lender's action was not within the False Claims Act. Neither this Act nor the Acts of Congress providing for loan guaranties were intended under circumstances such as these to impose on such lenders the burdens which the contrary result would bring about. See also 38 USCA §694(k).

The judgment is therefore affirmed as to Mortgage Investment Company of El Paso, Texas, but is reversed and

remanded[10] for further and other consistent proceedings as to the Dealer and Salesmen.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

[10]If in causes of action Numbers 32 and 33, no gratuity was in fact paid, and the 41st cause of action was not brought within the six-year limitation, such claims will remain for common law fraud only. Recovery or relief as to causes of action under the False Claims Act will not include relief in paragraph (2) and (23)(b) of the original Complaint and paragraphs (2) and (27)(b) of the Amended Complaint. *McNinch*, supra, cuts these off. If recoverable, this relief will depend upon applicable principles concerning liability and measure of damages for common law fraud as to which we have expressed no opinion.

APPENDIX II

BROWN, Circuit Judge, dissenting:

I differ with the Court in only one respect. I would reverse and *remand* for trial the 29 claims covered by the stipulation. The Court, by its action, orders the entry of summary judgment for the Government.

I.

First, I think that the Trial Court should be free to determine whether the Dealer-Salesmen might not rightfully be permitted to withdraw from this stipulation. Stipulations are to advance the cause of justice, to simplify fact settings, to sharpen questions of law, and permit a decision on them. Where, on the resolution of the law point (such as we have made on the question of the veteran's intent to occupy the home) adherence to the stipulation would or might produce an injustice or cause an unintended hardship, the Court may relieve counsel of their stipulation. Indeed, we regard the right and power of the Trial Judge to do this as vital and indispensable. *Laird v. Air Carrier Engine Service*, 5 Cir., 1959, F. 2d [No. 17359]; and see *Brinson v. Tomlinson*, 5 Cir., 1959, F. 2d [No. 17399]; *Carnegie Steel Co. v. Cambria Iron Co.*, 1902, 185 U. S. 403, 414; *Aronstam v. All-Russian Cent. U. of Consumers' Soc.*, 2 Cir., 1920, 270 Fed. 460, 464; *Russell-Miller Milling Co. v. Todd*, 5 Cir., 1952, 198 F. 2d 166, 169.

The stipulation here on the 29 cases served a useful purpose. From the outset the Dealer-Salesmen took the

position that *even though* they knew of the change in the veteran's intention, the Act, until the 1956 amendments, did not make that significant. To obtain a square ruling on that legal point, they stipulated the *ultimate fact* that at the time of loan closing the veteran did not intend to occupy the house as his home. But that stipulation was made in a setting in which they took just as persistently the position that no one knew or had good reason to believe that the veteran's intention at that moment was significant. In other words, the contention was that if this was an incorrect understanding of the law, the error in understanding and application was innocent and in good faith.

The Dealer-Salesmen were good prophets in the Trial Court for the Judge held that they were right both on the construction of the Act and on the good faith. They guessed wrong as to us—completely as to the interpretation of the law, and partially on good faith—since we are all in agreement that this latter could not be disposed of on Dealer's motion for summary judgment.

But without any of the subsidiary details compressed into the ultimate fact conclusions set forth in the stipulation, this Court proceeds to hold that this amounts to a confession that Dealer made a false claim *knowing* it to be false, with the purpose falsely to obtain money from the Government.

I cannot believe that, in the posture of this case at the time the parties were anxious for the Trial Court to make a ruling on the construction of the statute, any businessman

would have made any such concession, or that his lawyer would have permitted it to be done. At least the litigants and counsel should have the opportunity of having the Trial Court determine whether they are entitled to be relieved from the stipulation when the consequences are now so harsh and assuredly unexpected.

II.

Second, and more important, I do not think that the nature of the *intent* under the False Claims Act can be elucidated and determined apart from the *facts* which are yet unknown.

The Court ignores the intention of the person making or causing to be made the claim. It regards mistaken as synonymous with false, an erroneous understanding of the law the equivalent of an evil purpose to cheat the Government. It reasons that since the law has always required the veteran's purpose to occupy the property as his home at both the time of he application and loan closing, Dealer made a false claim since it "knew" of this law, but nonetheless persisted in filing a claim for the gratuity which Dealer "knew" was not payable. This rests entirely on knowledge of the law being imputed to the Dealer on the necessary fiction—but still a fiction—that citizens are presumed to know the law.

The question here is whether that fiction can justifiably be transposed onto the False Claims Act to set in train the penalties which here exceed $67,000.

The False Claims Act does not so read. Nor can it safely be read apart from the facts. In other words, its true interpretation and construction on the nature of the *intention* of the one making the claim should not be determined as an academic matter.

The Act penalizes any person "* * * who shall make * * * any * * * claim * * * knowing such claim to be false, fictitious or fraudulent * * *," note 1, *supra*. As a minimum the statute requires that the claim be *known* to be false, *known* to be fictitious, *known* to be fraudulent. What is the meaning of the *known?* Is it enough that the statement made be inaccurate, incorrect, mistaken as a factual proposition? Or is it that the actor understands (a) that the facts are not as he represents them to be, and (b) that to submit the fact will be to obtain money from the Government which he knows is not owed? Is it that the actor must consciously appreciate both the inaccuracy of the factual representation and the non-liability of the Government if the accurate fact were stated?

Similar questions arise as to the meaning of "false." Is a claim "false" merely because it is inaccurate or incorrect or mistaken? Must there be some purpose that one make a misrepresentation aware that it is wrong and is being asserted to obtain that which the actor knows is otherwise not payable? Does "false" acquire meaning by immediate association with "fictitious or fraudulent"? Does the intent to defraud have to exist with respect to a statement which is "false"? At least one Court indicates that this is so, *United States v. National Wholesalers*, 9 Cir., 1956, 236 F.

2d 944, cert. denied 353 U. S. 930, 77 S. Ct. 719, 1 L. Ed. 2d 724. Or is the intention to defraud confined to those assertions or representations which are "fictitious" or "fraudulent" as distinguished from "false"?

A careful examination of all cases under the False Claims Act fails to indicate any satisfactory answers to these serious questions. This Court then is making them wholly as an academic matter on the basis of a stipulation made in conclusionary terms.

A consideration of the False Claims Act and the analogous problem of intent in criminal cases demonstrates, I think, that we have jumped the gun on this serious question. That the False Claims Act is remedial and civil in nature, and hence not penal for purposes of double jeopardy[a] does not minimize its being "drastically penal" in fact. *United States ex rel Brensilber v. Bausch & Lomb Optical Company*, 2 Cir., 1942, 131 F. 2d 545, aff'd 320 U. S. 711, 88 L. Ed. 417. Indeed, here we are dealing with $67,000 as the penalty (including double the gratuity) in the 29 cases with the prospect of another $48,000 as to the remaining 21. To impose such terrific consequences upon a citizen because he deliberately set out on a course to obtain money from the Government which he knew was not rightfully due would be one thing. Congress might well have intended that result. To impose such consequences merely because the citizen (and some fine lawyers advising him) guessed wrong on

[a] See United States ex rel Marcus v. Hess, 1943, 317 U. S. 537, 63 S. Ct. 379, 87 L. Ed. 443; Rex Trailer Company, Inc. v. United States, 1956, 350 U. S. 148, 76 S. Ct. 219, 100 L. Ed. 149.

the law—or guessed wrong on what Court would someday hold he had guessed wrong on the law—is quite another thing. It would be surprising that Congress expected to hold the citizen to such prescience when the sovereign's own judges are known not only to make similar miscalculations, but the judiciary, with its hierarchy of successive appellate courts, is established as a recognition of the fact that judges will make mistakes on the law.

Much of the quibbling[b] about the remedial or civil or penal nature of the False Claims Act is put to rest by the latest characterizations of this Act by the Supreme Court.[c]

As we are "construing the provisions of a criminal statute * * *," *United States v. McNinch*, 356 U. S. 595 at 598, note *c*, *supra*, principles relating to criminal law are of immediate relevance. "Knowing" the claim to be false then is equivalent, or at least akin, to wilfully submitting a false claim. "The two words 'knowingly' and 'wilfully' are

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[b]The dissent in United States v. Tieger, 3 Cir., 1956, 234 F. 2d 589, 592, 595, cert. denied, 352 U. S. 941, 77 S. Ct. 262, 1 L. Ed. 2d 237, is typical. In *McNinch*, 356 U. S. 595, 600, note 10, the majority holding, not the dissent, was approved.

[c]"But it must be kept in mind, as we explained in Rainwater, that in determining the meaning of the words 'claim against the Government' we are actually construing the provisions of a criminal statute. Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions. * * *." United States v. McNinch, 1958, 356 U. S. 595, 598, S. Ct. , 2 L. Ed. 2d 1001, 1004. This referred specifically to note 8 and the related text in *Rainwater* which stated: "In reaching our conclusion, we are aware that the civil portion of the Act incorporates, as a test of liability, the provisions of the criminal section as they were set out in Section 5438 of the Revised Statutes of 1878, and that according to familiar principles the scope of these provisions should be confined to their literal terms. Yet even penal provisions must be 'given their fair meaning in accord with the evident intent of Congress.' United States v. Raynor, 302 U. S. 540, 552." Rainwater v. United States, 1958, 356 U. S. 590 at 592-93, 2 L. Ed. 2d 996, 999.

often used as equivalents. Certainly, the mere omission of the word 'wilfully' is not to be construed as eliminating the element of criminal intent from the crime." *Zaboni v. United States*, 5 Cir., 1955, 226 F. 2d 826, 828. In the context of this very Act relating to veterans' housing, we have defined wilful to mean "conscious that what he was doing was unlawful." *Corcoran v. United States*, 5 Cir., 1956, 229 F. 2d 295, 299.

The process in reaching the result in this case apparently is that (a) since the implied[d] representation that the veteran would occupy the house as his home was incorrect, i.e., wrong, mistaken, that makes it false because (b) the various papers were deliberately delivered and the other actions were intentionally taken at the time of the loan closing and (c) the Dealer is charged with unlawful purpose since the law considers that a person intends the natural consequences of his acts.

But this is to do what we condemned in *Hargrove v. United States*, 5 Cir., 1933, 67 F. 2d 820, 823, 90 A. L. R.

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[d]The representation was implied only. Even on the Government's theory the Dealer, up to the time of the loan closing, has done no wrong. The Dealer does, of course, know of the original Application for Home Loan Guaranty or Insurance handled as set forth in Step Two, note 5, supra. But at that time, under the stipulation, all was in order. The wrong arises when, in Step Four, note 5, supra, the Dealer "causes" the Lender to loan the money and issue the Certification of Loan Disbursement. The closest it gets to representation of the Veteran's intent is the certificate that "(5) The loan conforms otherwise with the applicable provisions of the Act and the regulations."

This is also emphasized by the stipulation itself, note 9, supra. It does not state that Dealer knew of the veteran's change of intention and then concealed it from the Lender, or that Dealer knew that the loan could be guaranteed only if the veteran's intent remained the same. Nor does it state that Dealer knew that under the catch-all certification of item (5) quoted above this comprehended the veteran's then existing intentions.

1276, 1280. "The Court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its wilful doing. In the first class of cases, especially in those offenses *mala prohibita*, the law imputes the intent. • • • In the second class of cases, a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence." *McBride v. United States*, 5 Cir., 1955, 225 F. 2d 249, 253-54. See also *Babb v. United States*, 5 Cir., 1958, 252 F. 2d 702, 707-8.

In assaying the legal consequences of action, there is a vast difference between intending to do the act which a statute might denounce and, on the other hand, purposely doing such act but with the added ingredient of a consciousness that it was illegal, i.e., in violation of known law. *St. Johnsbury Trucking Company v. United States*, 1 Cir., 1955, 220 F. 2d 393; 22 C. J. S., Criminal Law §29 (1940); 14 Am. Jur., Criminal Law §23 (1938). A conviction for a false FHA loan application under 18 USCA §1010 penalizing the making of "any statement, knowing the same to be false" was reversed, *Smith v. United States*, 6 Cir., 1956, 230 F. 2d 935, 939, for failure of the trial court to submit defendant's theory that what he had done in the loan transaction was done under the good faith belief that the action was permissible and that the lending bank official had so advised him.

The efforts of this and other Courts in wrestling with the complex problem of the kind of intent required under any penalty statute should serve as a warning that we ought not to undertake the formidable task as academicians. We ought to judge the law on the facts, and the law against the facts.

In this case the precise problem is whether Congress intended that the heavy sanctions of the False Claims Act flow from the purposeful submission of facts which happen to be incorrect, or whether the actor must have been conscious that the asserted fact was wrong and nevertheless submitted it deliberately knowing it to be incorrect and conscious that to do the latter was to claim a payment which the Government did not owe were the true facts known.

This should be answered in the light of facts, not an ultimate conclusion.

I, therefore, respectfully dissent to this extent.

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*One soon gets back to the opinion in Morissette v. United States, 1952, 342 U. S. 246, 250-52, 72 S. Ct. 240, 96 L. Ed. 288. See also 22 C. J. S., Criminal Law §§29, 30; 14 Am. Jur., Criminal Law §§23, 24; Reyes v. United States, 9 Cir., 1958, 258 F. 2d 774, 782-83; Anno, Wilfullness or intent as an element of offenses denounced by Federal Income Tax Law, 90 A. L. R. 1280 (1934). We have dealt with it many times. At the head of the list should be the thorough opinion written by Judge JONES in McBride v. United States, 5 Cir., 1955, 225 F. 2d 249, 253-55. See also Bernstein v. United States, 5 Cir., 1956, 234 F. 2d 475, 485; Fallen v. United States, 5 Cir., 1955, 220 F. 2d 946, 948; Baker v. United States, 5 Cir., 1955, 227 F. 2d 376, 378; Berkowitz v. United States, 5 Cir., 1954, 213 F. 2d 468, 472-75; Russell v. United States, 5 Cir., 1955, 222 F. 2d 197; Rent v. United States, 5 Cir., 1954, 209 F. 2d 893, 899-900.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit

By /s/ Clara R. James
Deputy
New Orleans, Louisiana JUN 25 1959

(SEAL)

APPENDIX III

JUDGMENT

Extract from the Minutes of April 3, 1959.

No. 17101

UNITED STATES OF AMERICA,

versus

PATRICK H. DEWITT, *et al.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and it is hereby remanded to the said District Court for further and other consistent proceedings in accordance with the opinion of this Court.

"Brown, Circuit Judge, Dissenting.

* * * * *

APPENDIX IV

Servicemen's Readjustment Act of 1944, as Amended

Sec. 694. General provisions governing loans—Eligibility; amount of guaranty; computation

(a) Any persons who shall have served in the active military or naval service of the United States at any time on or after September 16, 1940, and prior to the termination of the present war, or at any time on or after June 27, 1950, and prior to such date as shall be determined by Presidential proclamation or concurrent resolution of the Congress, and who shall have been discharged or released therefrom under conditions other than dishonorable after active service of ninety days or more, or by reason of an injury or disability incurred in service in line of duty, shall be eligible for the benefits of this subchapter. Entitlement derived from service on or after June 27, 1950, shall (1) cancel any unused entitlement derived from service prior to June 27, 1950, and (2) be reduced by the amount entitlement from such prior service shall have been used to obtain a direct, guaranteed, or insured loan (a) on real property which the veteran owns at the time of application or (b) as to which the Administrator shall have incurred actual liability or loss, unless in the event of loss or the incurrence and payment of such liability by the Administrator, the resultant indebtedness of the veteran to the Government shall have been paid in full. The unremarried widow of any person who met the service requirements for benefits under this subchapter and who died, either in service or after separation from service under conditions

other than dishonorable, as a result of injury or disease incurred in or aggravated by such service in line of duty (other than any such widow who by reason of her own service is eligible for the benefits of this subchapter), shall also be eligible for the benefits of this subchapter; and the term "veteran" as used in this subchapter shall include any such unremarried widow. Any loan made by such veteran within ten years after the termination of the war and any loan to a veteran eligible by virtue of active service on or after June 27, 1950, if made within ten years after such date as shall be determined by Presidential proclamation or concurrent resolution of the Congress, for any of the purposes, and in compliance with the provisions, specified in this subchapter, is automatically guaranteed by the Government by this subchapter in an amount not exceeding fifty per centum of the loan: PROVIDED, That the aggregate amount guaranteed shall not exceed $2,000 in the case of non-real-estate loans, nor $4,000 in the case of real-estate loans; or a prorated portion thereof on loans of both types or combination thereof. In computing the aggregate amount of guaranty or insurance entitlement available to a veteran under this subchapter, the Administrator may in his discretion exclude the initial use of the guaranty or insurance entitlement used for any loan with respect to which the security (1) has been taken (by condemnation or otherwise) by the United States, any State, or a local government agency for public use, or (2) has been destroyed by fire or other natural hazard, or (3) has been disposed of because of other compelling reasons devoid of fault on the part of the veteran: Provided, That any amount

paid by the Administrator under subsection (c) of this section shall be deducted from the amount payable on the succeeding loan under that section.

(b) Loans guaranteed under this subchapter shall be payable under such terms and conditions as may be agreed upon by the parties thereto, subject to the conditions and limitations of this subchapter and the regulations issued pursuant to section 694d of this title: PROVIDED, That the liability under the guaranty within the limitations of this subchapter shall decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the obligation: PROVIDED, further, That loans guaranteed under this subchapter shall bear interest at a rate not exceeding 4 per centum per annum and shall be payable in full in not more than thirty years, or in the case of loans on farm realty in not more than forty years: AND PROVIDED FURTHER, That (1) the maturity on a non-real-estate loan shall not exceed ten years; (2) any loan for a term in excess of five years shall be amortized in accordance with established procedure; (3) except as provided in section 694e of this title any real-estate loan, other than for repairs, alterations or improvements, shall be secured by a first lien on the realty, and a non-real-estate loan, except as to working or other capital, merchandise, good-will and other intangible assets, shall be secured by personalty to the extent legal and practicable: AND PROVIDED FURTHER, That the Administrator, with the approval of the Secretary of the Treasury, may prescribe by regulation from time to time such rate of interest, not in excess of

4½ per centum per annum, as he may find the loan market demands.

(c) An honorable discharge shall be deemed a certificate of eligibility to apply for a guaranteed loan. Any veteran who does not have a discharge certificate, or who received a discharge other than honorable, may apply to the Administrator for a certificate of eligibility. Upon making a loan as provided in this subchapter, the lender shall forthwith transmit to the Administrator a statement setting forth the full name and serial number of the veteran, amount and terms of the loan, and the legal description of the property, together with the appraisal report made by the designated appraiser. Where the loan is automatically guaranteed, the Administrator shall provide the lender with a loan guaranty certificate or other evidence of the guaranty. He shall also endorse on the veteran's discharge, or eligibility certificate, the amount and type of guaranty used, and the amount, if any, remaining. An amount equivalent to 4 per centum on the amount originally guaranteed shall be paid to the lender by the Administrator out of available appropriations, to be credited upon the loan. Nothing in this subchapter shall be deemed to preclude the assignment of any guaranteed loan nor the assignment of the security therefor.

(d) Loans guaranteed under this subchapter may be made (1) by any Federal land bank, national bank, State bank, private bank, building and loan association, insurance company, credit union, or mortgage and loan company, that is subject to examination and supervision by an

agency of the United States or of any State or Territory, including the District of Columbia, or (2) by any State. Any loan at least 20 per centum of which is guaranteed under this subchapter may be made by any national bank, or Federal savings and loan association; or by any bank, trust company, building and loan association; or insurance company organized or authorized to do business in the District of Columbia; without regard to the limitations and restrictions of any other statute with respect to—

(1) ratio of amount of loan to the value of the property;

(2) maturity of loan;

(3) requirement for mortgage or other security;

(4) dignity of lien; or

(5) per centage of assets which may be invested in real estate loans.

(e) Any loan proposed to be made to an eligible veteran by any lender not of a class specified in subsection (d) of this section may be guaranteed by the Administrator if he finds that it is in accord otherwise with the provisions of this subchapter.

(f) Notwithstanding the provisions in this subchapter respecting automatically guaranteed loans, the Administrator may at any time upon thirty days' notice require loans to be made by any lender or class of lenders to be submitted for prior approval, and no guaranty or insurance liability shall exist in respect to such loans unless evidence of guaranty or insurance is issued by the Administrator. June 22, 1944, c. 268, Title III, Sec. 500, 58 Stat. 291; Oct. 6, 1945, c. 393, Sec. 11B, 59 Stat. 542; Dec. 28, 1945, c. 588, Sec. 8,

59 Stat. 626; August 10, 1948, c. 832, Title I, Sec. 103, 62 Stat. 1275; Apr. 20, 1950, c. 94, Title III, Sec. 301(a-c), 64 Stat. 74; July 16, 1952, c. 875, Title III, Secs. 301, 302, 66 Stat. 682; July 1, 1953, c. 177, Sec. 2, 67 Stat. 136.

Sec. 694a. Loans for homes; amount of guarantee.

(a) Any loan made to a veteran under this subchapter, the proceeds of which are to be used for purchasing residential property or constructing a dwelling to be occupied as his home or for the purpose of making repairs, alterations, or improvements in property owned by him and occupied as his home, is automatically guaranteed if made pursuant to the provisions of this subchapter, including the following:

(1) That the proceeds of such loan will be used for payment of the property purchased or constructed or improved;

(2) That the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and expenses, and the veteran is a satisfactory credit risk; and that the nature and condition of the property is such as to be suitable for dwelling purposes; and

(3) That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, or alterations does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator.

(b) Any loan made under this subchapter to a veteran who has not, after April 20, 1950, availed himself of the

benefits of this subchapter for the purpose of purchasing residential property or constructing a dwelling to be occupied as his home, the proceeds of which loan are to be used for that purpose, may, notwithstanding the provisions of subsection (a) of section 694 of this title relating to the percentage or aggregate amount of loan to be guaranteed, be guaranteed, if otherwise made pursuant to the provisions of this subchapter, in an amount not exceeding sixty per centum of the loan: PROVIDED, That the amount of any such guaranty shall not exceed $7,500, less the amount with which the veteran's entitlement for real estate purposes is properly chargeable on account of prior loans, nor shall the gratuity payable under subsection (c) of section 694 of this title exceed that which is payable on loans guaranteed in accordance with the maxima provided for in subsection (a) of said section. June 22, 1944, c. 268, Title III, Sec. 501, 58 Stat. 292; Dec. 28, 1945, c. 588, Sec. 8, 59 Stat. 628; Apr. 20, 1950, c. 94, Title III, Sec. 301(d), 64 Stat. 75; Sept. 1, 1951, c. 378, Title VI, Sec. 613(b), 65 Stat. 316; July 16, 1952, c. 875, Title III, Sec. 303, 66 Stat. 683.

Sec. 694d. Rules and regulations; delegation of authority; minimum construction requirements appraisals

(a) The Administrator is authorized to promulgate such rules and regulations not inconsistent with this subchapter, as are necessary and appropriate for carrying out the provisions of this subchapter, and may delegate to subordinate employees authority to issue certificates, or other evidence, or guaranty of loans guaranteed under the provi-

sions of this subchapter, and to exercise other administrative functions under this subchapter.

(b) No loan for the purchase or construction of residential property on which construction is begun subsequent to sixty days from July 16, 1952 shall be financed through the assistance of the provisions of this subchapter unless the property meets or exceeds minimum requirements for planning, construction, and general acceptability prescribed by the Administrator: PROVIDED, That this subsection as originally enacted shall continue to be applicable to construction begun prior to the end of such sixty-day period: PROVIDED FURTHER, That this subsection shall not apply to a loan for the purchase of residential property the construction of which was completed more than one year prior to the making of such loan.

(c) The Administrator shall have the right to refuse to appraise any dwelling or housing project owned, sponsored, or to be constructed by any person identified with housing previously sold to veterans under this subchapter as to which substantial deficiencies have been discovered, or as to which there has been a failure or indicated inability to discharge contractual liabilities to veterans, or as to which it is ascertained that the type of contract of sale or the methods or practices pursued in relation to the marketing of such properties were unfair or unduly prejudicial to veteran purchasers. June 22, 1944, c. 268, Title III, Sec. 504, 58 Stat. 293; Dec. 28, 1945, c. 588, Sec. 8, 59 Stat. 629; Apr. 20, 1950, c. 94, Title III, Section 301(f), 64 Stat. 75; July 16, 1952, c. 875, Title III, Sec. 304, 66 Stat. 683.

APPENDIX V

1956 Amendment to the Servicemen's Readjustment Act of 1944

Sec. 694d. Rules and regulations: delegation of authority; minimum construction requirements; appraisals; certification of occupation

(d) No loan for the purchase or construction of residential property shall be financed through the assistance of the provisions of this subchapter unless the veteran applicant, at the time that he applies for the loan, and also at the time that the loan is closed, certifies, in such form as may be required by the Administrator, that he intends to occupy the property as his home. No loan for the repair, alteration, or improvement of residential property shall be financed through the assistance of the provisions of this subchapter unless the veteran applicant, at the time that he applies to the lender for the loan, and also at the time that the loan is closed, certifies, in such form as may be required by the Administrator, that he occupies the property as his home. For the purpose of this subchapter the requirement that the veteran recipient of a guaranteed or direct home loan must occupy or intend to occupy the property as his home shall be construed to mean that the veteran as of the date of his certification actually lives in the property personally as his residence or actually intends upon completion of the loan and acquisition of the dwelling unit to move into the property personally within a reasonable time and to utilize such property as his residence. As amended Aug. 1, 1956, c. 854, Sec. 1(7), 70 Stat. 914.

APPENDIX VI

False Claims Act

1. RS Sec. 3490(1878): "Any person * * * who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight [RS Sec. 5438 (1878)] shall forfeit and pay to the United States the sum of Two Thousand Dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act * * *."

RS Sec. 5438(1878): "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent * * * shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."